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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

RAMON ALVARADO,

Defendant and Appellant.

2d Crim. No. B172474
(Super. Ct. No. NA058079-01)
(Los Angeles County)

Ramon Alvarado was charged with four counts of making terrorist threats (counts 1–4) and one count of stalking (count 5). (Pen. Code, §§ 422, 646.9, subd. (a).)¹ A jury found him guilty on counts 1, 2, 4, and 5, and he was sentenced to prison for an aggregate term of three years four months. He contends that insufficient evidence was presented to support his conviction for criminal threats and the court erred by failing to instruct the jury sua sponte on the lesser included offense of attempted criminal threats. We affirm.

Facts

Sandra and appellant were married for 21 years and had three children, ages 20, 18, and 13. In March of 2002, Sandra decided to separate from appellant because he was seeing other women. She and the children moved to a residence in Long Beach.

¹ All statutory references are to the Penal Code.

In November of 2002, appellant needed a place to stay and Sandra agreed to let him sleep in her living room. According to Sandra, after a few weeks, appellant began acting as if they were together again, and he attempted to control whom she called and what she did. Sandra asked him to leave and they started to have arguments daily. Appellant told Sandra he did not want to find out she was seeing someone else and he was going to live with her whether or not she wanted him to do so.

In December of 2002, Sandra obtained a restraining order against appellant. He told her he did not care about the restraining order and refused to leave her home.

A. Count 5 -- stalking between January 4, 2003 and June 25, 2003

On January 4, 2003, appellant became angry after seeing Sandra's cellular telephone bill and discovering that she was talking to someone else. Sandra testified that he started throwing things, such as a clock and an iron. Sandra became frightened and left with her youngest child to go to her brother's house in Torrance.

Sandra testified that when she got to her brother's house, appellant telephoned her and asked her to return home alone. Because she was afraid of him, she told him "No." Appellant told her that if she did not return, he would destroy the house and rip apart her clothes. Sandra told him she would return and then contacted the police. Accompanied by police, she went home and found all of her clothes torn and placed in the trash. Appellant had painted her bed with red spray paint and had written the words "son of a bitch" in Spanish in red paint on a mirror in her room.

Sandra then moved into her brother's house with all three of her children. She testified that from January 4, 2003, through March 8, 2003, appellant came to her brother's house three or four times a week to talk. Sandra asked him to leave and told him he could not have contact with her because of the restraining order. Sandra testified that from January 4, 2003, to June 25, 2003, he parked outside of her home almost every day. She saw a psychologist because of the emotional stress.

B. Count 1 -- criminal threats on March 8, 2003

On March 8, 2003, Sandra came home from work and found appellant waiting for her. He told her he wanted to get back together. When Sandra replied "No," he became very upset. He kicked Sandra's car and dented it. Sandra called 911. When appellant saw her using the telephone, he left and said he was going to come back and kill her.

Sandra testified that she did not know whether she believed he would actually kill her, but she was frightened because she did not know what he would do if he lost control. After the incident, he called her every day and told her that he was going to "do something" to her if she did not get back together with him.

C. Count 2 -- criminal threats on March 17, 2003

Sandra moved to an apartment in Torrance on March 15, 2003. On March 17th, appellant called Sandra and said he was tired of the situation. He told her she was not going to get to work that day, and that he was going to "finish her off." Sandra understood this to mean that he was going to kill her and reported the call to the police. She testified that she was frightened by this threat and asked her son to take her to and from work. Appellant continued to call her cell phone 2 to 15 times a day.

Sandra testified that on April 22, 2003, appellant arrived at her apartment very upset. He pounded on the security door trying to open it and bent the door. Appellant said things, but she did not listen because she was frightened. Her daughter called the police and he left. As he left, he hit Sandra's car.

D. Count 3 -- criminal threats on June 17, 2003

On June 17, 2003, Sandra went to the police station again. Appellant had continued to tell her that she had to go back to him even if she did not want to, she could never be with another man, and that he would kill her or anyone with her. Sandra testified that from January 4th through mid June of 2003, she was scared, nervous and depressed all the time as a result of his threats. She thought appellant might hurt her.

E. Count 4 -- criminal threats on June 25, 2003

On June 25, 2003, appellant called Sandra at work 30 or 40 times. He asked her what she was doing on her lunch break. She replied that she was going to eat her lunch. Appellant said, "No. For sure you are going to go to the bathroom and have sex with the men there." Appellant added that he was tired and this was "the last day [she] was going to exist." Sandra thought appellant wanted to kill her. She testified she was afraid and called the police before she left work.

Sandra left work and drove home. When she arrived home, she noticed movement in her other car and saw appellant get out of her car. Appellant came up to the car she was in and hit the driver's side window with his fist. He said, "I told you today is the last day you are going to exist." Sandra was frightened and moved her car. Appellant then ran after her and told her to get out of her car. Sandra told appellant, "This is not going to be the last day I exist. This is going to be your last day free." Appellant ran away. Sandra parked her car and fled inside her apartment. About two or three minutes later, appellant started hitting the front door. Sandra called the police and appellant left.

At 11:00 a.m., appellant returned. Sandra called the police again and appellant left. Later, Sandra went to court to get a copy of her restraining order. While she was there, appellant called her and asked her who she was with and what she was doing. Sandra testified that from January 4, 2003, through June 25, 2003, she saw appellant almost every day at or near her residence, either parked or walking outside, or coming up to her residence.

Appellant testified in his own defense that he was unhappy he and his wife separated, and he constantly tried to get back together with her. He admitted tearing up her clothes out of anger and writing on her dresser mirror, "You are a whore." He admitted taking his anger out on a wall or Sandra's car and hitting her screen door, but denied ever threatening her. He claimed that on the day he was arrested, he went to Sandra's home because he ran out of gas. He denied threatening her that day.

The jury found appellant guilty on counts 1, 2, 4, and 5. The trial court declared a mistrial as to count 3 after the jury was unable to reach a verdict on that count.

Sufficiency of the Evidence on Counts 1, 2 and 4

Appellant contends his conviction on counts 1, 2 and 4 for making terrorist threats should be reversed based on insufficient evidence. He argues the prosecution failed to establish all the elements of the offense. We disagree.

On appeal, we "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence--that is, evidence which is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Ceja* (1993) 4 Cal.4th 1134, 1138.) Conflicts in the evidence and reasonable inferences must be resolved in favor of the judgment. Where evidence is sufficient to justify a reasonable inference that the requisite intent existed, the finding of intent by the trier of fact will not be disturbed on appeal. (*People v. Ferrell* (1990) 218 Cal.App.3d 828, 834.)

In order to establish a violation of section 422, the following elements must be proven: (1) a person willfully threatened to commit a crime which if committed would result in death or great bodily injury to another person; (2) the person made the threat with the specific intent that the statement is to be taken as a threat, even if there is no intent of actually carrying it out; (3) the threatening statement on its face, and under the circumstances in which it was made, was "so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat"; (4) the threatening statement caused the other person "to be in sustained fear" for his or her own safety; and (5) the threatened person's fear was reasonable under the circumstances. (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)

Appellant argues the evidence was insufficient to establish the requisite element of intent because his threats amounted to nothing more than emotional outbursts

or "angry ranting soliloquies." He argues his threats to kill or "finish off" his wife were made about the future, i.e., he told her he was going to come back and kill her, and talked to her on the telephone about what he "might" do to her if she did not come back to him. He argues the threats were remote in that they were made on the telephone, outside a car window, and outdoors at a distance from his wife.

In evaluating the intent required by section 422, the threatening statement must be examined on its face and under the circumstances in which it was made. (*People v. Felix* (2001) 92 Cal.App.4th 905, 914.) The circumstances include the defendant's mannerisms, affect, and action involved in making the threat, as well as subsequent actions taken by the defendant. (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1013.) There is no requirement the person making the threat actually intend to carry it out. (*People v. Butler* (2000) 85 Cal.App.4th 745, 759.)

Here, the evidence of specific intent was strong. The threats underlying counts 1, 2, and 4 were all made in the context of a continuing pattern of harassment, stalking, and physical aggression. For example, the March 8th threat that appellant would come back and kill Sandra was made after he refused to move out of her home, ignored a restraining order prohibiting contact with her, stalked her for three months, ripped her clothing, and spray-painted profanity on her furniture. Shortly before he made the threat, he kicked her car with such force that he dented it. Following the March 8th threat, he made more death threats, repeatedly parked outside her home, pounded on her car window with his fists, chased her as she tried to drive away, and pounded and bent the door to her apartment. In this context, the jury could reasonably infer that appellant specifically intended that his statements be taken as a threat. Likewise, given the pattern of harassment and physical aggression toward Sandra, the jury could reasonably infer that the March 17th threat that appellant was going to "finish her off" and the June 25th threat that this is "the last day [she] was going to exist" were specifically intended to be taken as a threat.

We reject appellant's attempt to analogize his conduct to the emotional outburst described in *In re Ricky T.* (2001) 87 Cal.App.4th 1132. There, a high school student became angry when a teacher accidentally hit him with a door as he opened it. After the student cursed the teacher and said he would get him, the student was suspended from school. The appellate court reversed the lower court's finding that the minor made a terrorist threat, concluding there was no immediacy to the threat and no showing of sustained fear. (*Id.* at pp. 1137-1138.) The court reasoned that while the remarks were intemperate, rude, and insolent, they were no more than "a vague threat of retaliation without prospect of execution." (*Id.* at p. 1138.) There was no evidence of any circumstances after the remarks that would have supported a finding of a terrorist threat. The angry words were not accompanied by a show of physical violence or display of fists, and the police were not called until the next day. Nor was there any evidence the teacher felt any sustained fear beyond the time of the angry utterances. The appellate court noted that section 422 was not enacted to punish emotional outbursts and targets only those who try to instill fear in others. (*Ricky T.*, at p. 1141.)

Here, unlike the facts of *Ricky T.*, appellant's threats were accompanied by acts of physical aggression and harassment. The only rationale inference from appellant's words and conduct is that he intended to frighten Sandra. Ample evidence supports the conclusion that appellant intended his words to constitute a threat.

Continuing on with the theme that his conduct amounted only to a pattern of offensive, but relatively harmless, behavior, appellant next contends the circumstances of his conduct militate against a finding of gravity and immediacy. He points out that although he kicked Sandra's car and beat on her car window on another occasion, he did not attempt to touch her and left the scene thereafter.

A determination as to "whether the words were sufficiently unequivocal, unconditional, immediate and specific they conveyed to the victim an immediacy of purpose and immediate prospect of execution of the threat can be based on all the surrounding circumstances and not just on the words alone. The parties' history can also

be considered as one of the relevant circumstances.'" (*People v. Butler, supra*, 85 Cal.App.4th at p. 754.) Here, the threats were sufficiently immediate. Although appellant made his March 8th threat as he fled because the police had been called, his threat that he would come back and kill Sandra was sufficiently immediate. Similarly, the March 17th threat that appellant was going to "finish off" Sandra was clear and immediate even though he conveyed the threat over the telephone. When appellant told Sandra on June 25th that today was the last day she was going to exist, the threat was very immediate. As noted above, each of the threats were made in the context of a continuing pattern of harassment, physical aggression, stalking, and a refusal to accept Sandra's decision to end their relationship. A jury could rationally find that his threats conveyed a gravity of purpose and immediate prospect of execution.

Finally, we reject appellant's contention that the evidence failed to establish sustained and reasonable fear. "Sustained" fear means fear that is "beyond what is momentary, fleeting, or transitory." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156 [15 minutes of fear more than sufficient to satisfy sustained fear element of section 422].) The March 8th threat occurred after appellant kicked and dented her vehicle. Sandra testified that she was frightened and her daughter confirmed she was scared. Although she did not know whether she actually believed appellant would kill her, Sandra explained she was frightened because she did not know what appellant would do if he lost control and even saw a psychologist to deal with the emotional distress. She reported the incidents to the police and testified that one week later, on March 17th, she was still frightened from the March 8th incident. Similarly, after the March 17th threat, Sandra testified that she was so frightened she called the police and had her son take her to and from work. She testified that she remained afraid into mid-June. Finally, after the June 25th threat, Sandra fled inside her apartment and telephoned police after appellant started banging on her front door. There was ample evidence that her fear after each threat was sustained and reasonable under circumstances, which included a lengthy period of harassment and stalking, and incidents of damage to personal property, including her

vehicle, clothing, and the front door of her residence. Substantial evidence supports appellant's conviction for making terrorist threats.

Failure to Instruct the Jury on Attempted Criminal Threats

Appellant contends the trial court erred by failing to instruct the jury sua sponte on the lesser included offense of attempted criminal threats. He argues the lack of evidence that his wife was in sustained fear is sufficient to indicate the jury could have found him guilty of the lesser included offense. He notes that she took his calls, he never touched her, and she did not believe he would actually kill her. The court did not err.

Attempted criminal threat is a lesser included offense of making a criminal threat. (See *People v. Toledo, supra*, 26 Cal.4th at pp. 230, 235.) An attempted criminal threat occurs if a defendant "orally makes a sufficient threat directly to the threatened person, but for some reason the threatened person does not understand the threat," or "makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not *actually* cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear." (*Id.* at p. 231.)

"[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence. On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) As explained in *Breverman*, "the existence of 'any evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury." (*Ibid.*) Substantial evidence in this context means evidence from which a jury composed of reasonable persons could conclude that the lesser offense, but not the greater, was committed. (*Ibid.*)

Here, as to counts 1, 2 and 4, there was no evidence to support the theory that appellant committed only an attempt. As noted above, the evidence showed

sustained and reasonable fear on Sandra's part. Appellant's threats were accompanied by acts of physical aggression and were made in the context of continual harassment.

Sandra testified that she was afraid of appellant, she was unsure what he might do if he lost control but thought he might hurt her, her daughter witnessed her fright, and her fear was reasonable under the circumstances. There was no evidence suggesting that Sandra was not actually in fear. When there is no evidence that the crime committed was less than that charged, courts need not instruct on lesser included offenses. (*People v.*

Breverman, supra, 19 Cal.4th at p. 162; *People v. Wilson* (1992) 3 Cal.4th 926, 941-942.)

The judgment is affirmed.

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COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

Mark C. Kim, Judge
Superior Court County of Los Angeles

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